Supreme Court, U.S.
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No. 01-1364

IN THE

SUPREME COURT OF THE UNITED STATES

WALTER JITNER

Petitioner

v.

COMMERCIAL FINANCIAL/SPC ACQUISITIONS, INC.-

and

FINANCIAL COLLECTIONS, INC.

On Petition for Writ of Certiorari
To The U.S. Ninth Circuit Court of Appeals #98-56810

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

Respondants seek to alter the questions raised by JITNER's Petition. Respectfully JITNER submits that the federal issues raised by his petition are covered by the following two questions:

1. In an area of law regulated by Congress, but where Congress has not passed legislation relating to a specific issue, and when the United States Supreme Court therefore has said to look to applicable State law, may the lower federal courts disregard State law and instead create their own federal common law?

2. Assume the FDIC is in possession of a note which is not made payable to it. What requirements must be met before the FDIC has rights under the note? The 1st Circuit Court of Appeal held this question must be answered by State Law, in that case, the law of Maine. Applying that law the court held possession of the note is not sufficient; rather, the FDIC must also prove the transaction through which it acquired the note. If state law applied in the instant case it would be California law which is identical to that of Maine. The 9th Circuit in the instant case did not follow state law; in direct conflict with the 1st Circuit it formulated a federal common law rule of the case by which possession alone (without proof of the transaction through which the FDIC acquired the note) is sufficient to give the FDIC rights in the note which may be assigned to plaintiff. Which Circuit is correct?

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I
NOTATION SCHEME

Petitioner, JITNER, pursuant this Court's Rule 15.6, is constrained to reply to several misstatements of fact as well as mischaracterizations which appear in Respondants' "Brief in Opposition". In this Reply "RBO, p5" will be a reference to page 5 of that brief; "PC, p5", to page 5 of the Petition for Certiorari. There are two further references: "OB, p5" will refer to page 5 of JITNER's opening brief below and "ER, p5", to page 5 of the Excerpts of Record filed below.

II
INTRODUCTION

This remains a simple case which raises two federal issues. First, JITNER signed two notes, one payable to BEVERLY bank and the other to INDEPENDENCE bank. The FDIC, apparently, came into possession of the notes, which show NO endorsement from the banks to the FDIC. the FDIC endorsed the notes to plaintiffs who sued JITNER. In the trial court plaintiffs presented two declarations stating that the FDIC obtained the notes as receiver of the payee on the face of the notes (i.e. the banks). JITNER objected to consideration of the declarations on evidentiary and Civ Rule 56(e) grounds. Over his objections the trial court considered the declarations, based upon them found the FDIC was the banks' receiver and gave plaintiffs summary judgment.

JITNER appealed claiming that the trial court's denial of his evidentiary and Civ. Rule 56(e) objections

was error. The 9th Circuit found it unnecessary to address these objections because it formulated a federal common law rule[1] of the case that made the FDIC's mere possession of the notes sufficient for the FDIC to obtain rights in the notes which it could assign to plaintiff. This federal common law rule is in direct conflict with Cal Comm Code § 3203 and official comment 2 thereto (hereafter "§3203"). In O'Melveny & Myers v FDIC 512 US 79, 114 S. Ct. 2048, 129 L. Ed 67 (1994) this court, in reversing a 9th Circuit case, held that in the absence of a federal statutory rule governing the FDIC, state law must apply; the courts are not free to create federal common law. The first federal issue is whether by formulating its common law principal the 9th Circuit violated this court's holding in the O'Melveny & Myers case.

Second, in the 1st circuit case, FDIC v Houde 90 F. 3d 600 (1st cir, 1996), the facts were strikingly similar to those of the instant case[2]. The 1st Circuit held against the FDIC having enforceable rights stating that under State law in order to obtain rights in the note the FDIC had to prove the transaction through which it acquired the note. The 9th Circuit, in direct conflict with the 1st Circuit, dispensed with the need for the FDIC to prove the transaction through which it acquired the note. The second federal issue is whether the Houde court or the 9th Circuit is correct.

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1. Federal common law because the court points to No federal statutory authority for its position.
2. In Houde the focus is on the break of chain of title to the note was between a bridge bank and the FDIC; in the instant case between the original bank and the FDIC.

III
MISTATEMENTS

A. Respondents Falsely State That The FDIC's Receivership Is Not in Dispute

Respondents assert it is undisputed that "the FDIC took over that bank [payee on the face of the notes] and acquired its assets" RBO, p1. This is false. JITNER's appeal below argued there was no competent evidence to prove the findings of fact of the trial court, including the fact that the FDIC was the receiver of the payee banks, PC p4-6 including nt.5.

B. Respondents Falsely Assert in This Case That 12 USC § 1821 (d) (2) Preempts State Law and That the Houde Case and JITNER IGNORED That Statute

Respondents assert that 12 USC § 1821 (d) (2) trumps state law and gives the FDIC rights in the notes RBO, p2. Both the Houde court 90 F 3d at 606 and JITNER PC, p14-15 have acknowledged that IF the evidence brought the FDIC within the ambit of 12 USC § 1821 (d) (2), the FDIC, by operation of federal statutory law, would succeed to the payees' rights under the note and §3203 requirements would be satisfied. But, both have pointed out that for that section to apply there must be evidence that indeed the FDIC was appointed "conservator or receiver"; 12 USC § 1821 (d) (2) begins with: "the Corporation [FDIC] shall, as conservator or receiver, and by operation of law succeed to..." (emphasis added). The problem in the present case is that; (1) at trial there was no competent evidence of the FDIC's receivership and, (2) at the appellate level, the 9th Circuit federal

common law rule of the case dispenses with the need to prove how the FDIC acquired the notes (i.e dispenses with the need to prove the FDIC receivership.)[3]

To paraphrase the Respondents statement at RBO, p7: "Respondents apparently assume that 12 USC § 1821 (d) (2) does not mean what it says; namely, that it does not mean that before the FDIC can assert rights under that section it must first prove its receivership by competent evidence."[4]

C. Respondents' Falsely Assert That the Trial Court Relied on Declarations of the FDIC Assignees' Custodians of Records

Respondent's assert that the declarations in support of summary judgment were of the FDIC

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3. The trial court, over JITNER's evidentiary and Civ Rule 56 (e) objections, considered certain declarations which asserted the FDIC's receivership. This in part, was the basis of JITNER's appeal. The 9th Circuit did not address those objections because its ruling dispensed with: 1) the need to prove the FDIC receivership in order to bring the matter within 12 USC § 1821 (d) (2); or, 2) the need, under Cal Comm Code § 3203 to prove the transaction through which the FDIC obtained the notes PC, p8-9. Thus, the 9th Circuit turned its back on this court's rule in O'Melveny & Myers v. FDIC 512 US 79 and refused to apply California law.

4. Respondents tacitly acknowledge that the Houde opinion and the 9th Circuit's opinion are irreconcilable. This surely is grounds for Certiorari.

assignees' custodians of records. RBO, p4 and 1. The declarants were not custodian of the records and they were not even employees of the FDIC assignees; rather, they were employees of the assignees' servicing agent PC, p4[5], a completely separate entity from the assignees. (Note in Houde 90 F 3 at 606 the FDIC's custodian of records testimony that FDIC records would reflect the FDIC receivership was not competent evidence to establish receivership)

It is ironic that Respondents argue that "documents can speak for themselves" RBO, p4, when these declarations did not provided the documents upon which declarants relied and which would have proven the declarants' assertions of the FDIC receivership PC, p5, at nt. 5; instead they had the declarants speak for those documents.[6]

D. The California Cases Cited by Respondents Actually Support JITNER's Position

Respondents cite three Californian cases to support their assertion that JITNER mistakes the import of Cal Comm Code § 3203 ("§ 3203") RBO,

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5. At ER, p 135 declarant in paragraph 4 states, "I am the Compliance Officer employed by Commercial Financial Services, Inc [referred to in PC, p4 as "SERVICES] the provider of services to CFS ["Commercial"] and at ER p563 in paragraph 5 the declarant states the same thing regarding "FCI" [i.e. FINANCIAL]

6. The declarants at ER, p134 and p562, in paragraph 5, state that their factual assertions are based upon their conclusions as to what the records would reflect.

p7-9. While that for which these cases stand is irrelevant to the federal issues raised, out of an abundance of caution JITNER points out that Respondants use of these cases is misleading.

The quotation from Security Pac Nation Bk v. Chess (1976) 58 Cal App 3d 555, 565 upon which Respondents rely (RBO, p8) is actually a Federal Court's interpretation of Massachusetts law. The California court goes on to state that the quote can be read as irreconcilable with the language of Cal Comm Code § 3201 (hereafter "§ 3201") 58 Cal App 3d at 365-66.

It is also misleading to cited the Chess case for the proposition that JITNER's reliance on § 3203 is misplaced because The Chess court actually relied on § 3203; however, at that time the content of § 3203 appeared in then Cal Comm Code § 3201. In 1992 § 3201 was repealed and reenacted as current § 3203[7]. The Chess court relied on § 3201 (now § 3203) to indicate plaintiff was transferee of the note. It is significant that the Chess court's comment on § 3201 (now § 3203) is: "one who is not a holder must first establish the transaction by which he acquired the

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7. The "History and Statutory Note" following § 3203 and § 3201 in the annotated codes will show that in 1992 old § 3201 was repealed and reenacted as current § 3203.

instrument before enforcing it"[8] 58 Cal App 3d at 565.

In D'Orazi v Polz of Canton (1967) 254 Cal App 2d 901 the facts indicate that the note was made payable to a company and on the back of the note there was an assignment by the payee of a one-half undivided interest in the note to plaintiff 254 Cal App 2d at 903; there was no break in the chain of title to the note. In the instant case there is no evidence of an assignment to the FDIC by payees; and thus, there is a break in the chain of title.

The quote in White v Moriarty (1993) 15 Cal App 4th 1290, 1296 nt 2, relied on by Respondents (RBO, p8-9), is incomplete and misleading. Unlike the instant case nowhere in White was the issue raised as to the FDIC's rights in the note. The issue addressed in nt 2 was soley whether there was an FDIC assignment to plaintiff; Respondents omitted the following which immediately preceded the words they quoted 15 Cal App 4th nt 2 at 1296.

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8. The Chess case found that plaintiff had rights under the note not endorsed to it because plaintiff had an assignment from a holder. However, plaintiff could not be a holder, because a holder must be in possession of the note and the instrument must be made payable to him. Cal Comm Code § 1201 (20) The Chess plaintiff was a transferee under old § 3201 (now § 3203) because of an assignment separate from the note. He could not be holder because the note was not made payable to him 58 Cal App 2d at 562; just as in instant case the notes nowhere on their face are made payable to the FDIC. Furthermore, the 9th Circuit ignored JITNER's claim that there was no competent evidence the FDIC was a transferee under § 3203.

> Moriarty [defendant] argues that there was not substantial evidence that White [plaintiff] actually acquired the note from the FDIC. However the note bears the FDIC endorsement to GFS and from GFS to White.

The parties on appeal did not question whether the FDIC was in a position to enforce the bank's note. It is clear that the only claim of break in the chain of title to the note on appeal was from the FDIC to plaintiff and that was refuted by the evidence at trial.

In summary, the Chess case: (1) actually questions the quotation relied on by Respondent, (2) did rely on old § 3201 (present § 3203) and (3) affirmed the need for a possessor who is not a payee on the note to prove the transaction through which he acquire the note before he can enforce it. In the D'Orazi and White cases, based on the evidence, there was no break in the chain of title from the payee on the note to the plaintiff. Key to the case at hand is the claim of a break in the chain of title PC, p2-4.

E. Respondants Erroneously Attempt To Limit This Court's Holding In O'Melveny & Myers

Respondents assert that JITNER's reliance on O'Melveny & Myers v FDIC 512 US29, 114 S. Ct 2048, 129 L.Ed 2d 67 (1994) is misplaced since the case held that California tort law applied because there "was no Federal common law as to the tort involved" RBO, p5. First, the Court held there could be no Federal common with regard to the FDIC. Second, that statement underscores the need for this court to grant certiorari

because the holding in O'Melveny & Myer is broader than that. It holds that ANY issue not expressly covered by the federal FDIC statutory scheme must be decided by State law -- the courts are not free to create Federal common law. JITNER recognized that if there was competent evidence of the FDIC's receivership, then under 12 USC § 1821 (d) (2) there would be no break in the notes' chain of title PC, p14-16[9]; and, the requirement of § 3203 would be satisfied. In the absence of competent evidence which brings the FDIC within the ambit of 12 USC 1821 (d) (2) (namely, in the absence of competent evidence of an FDIC receivership), California law would apply and there would have to be proof of the transaction through which the FDIC obtained the notes. JITNER's appealed to the 9th Circuit asserting a break in the chain of title because the only evidence offered to establish the transfer of rights to the FDIC was evidence to which JITNER objected on evidentiary on Civ Rule 56(e) grounds. Because the trial court ignored his objections he appealed, claiming error based on the trial court's reliance on the declarations to which he had objected.

It is beyond dispute that the 9th Circuit's opinion avoided addressing these evidentiary and Civ Rule 56(e) objections because by its own Federal common law rule of the case it dispensed with the need to prove the transaction through which the FDIC acquired the note. Thus, in contradiction to § 3203, it held that mere possession of the notes by the FDIC (without

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9. This discussion was raised below in JITNER's opening brief at OB, p27-29 and in his Petition for the Rehearing below.

proof of the transaction through which it acquired them) was sufficient for the FDIC to acquire rights in the notes which it could assign to plaintiffs PC, p8-10. In so holding the 9th Circuit not only formulated a federal common law rule in contradiction to § 3203; but, it also ignored and turned its back on this Court's O'Melveny & Myers holding. Further it also set itself in direct opposition to the Houde case.

IV
CONCLUSION

The basic issue raised in JITNER's Petition remains. JITNER asserts there was no competent evidence: 1) of an endorsement to the FDIC; 2) of an FDIC receivership; or, 3) of the transaction through which the FDIC acquired the notes. The 9th Circuit, consistent with this court's holding in O'Melveny & Myers, should not be allowed to avoid addressing these claimed errors in law by fashioning a federal common law rule in conflict with California law; namely, a rule which allows mere possession of the note by the FDIC to be sufficient for the FDIC's acquisition of rights under the notes which it can in turn assign to plaintiffs. Rather, this court should affirm the opposite point of view expressed in FDIC v Houde, supra, which is the view required by this Court's O'Melveny & Myers holding and by California law.

Respectfully submitted,

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APPENDIX

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Excerpt from Page 85 of O'Melveny & Myers v FDIC
512 US 79, 85; 1145 Ct. 2048;
129 L.Ed 67 (1994)

In answering the central question of displacement of California law, we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made - rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law.

Excerpts from Pages 606 and 607 of FDIC v Houde
90 F3d 600

What remained, therefore, was for the FDIC to establish a proper transfer of the Note to it in its suing capacity (receiver of NMNB) from the Note's holder, MNB.

(5) The first step in this transfer could rather have been established given the provisions of FIRREA. A transfer of all the holder's (MNB's) rights in the Note to the FDIC as receiver for MNB could be demonstrated simply by showing that the FDIC became the receiver of MNB. Once a receivership of a failed bank takes place, the transfer of the failed bank's assets to the FDIC occurs by operation of law - the FDIC as receiver of a failed institution succeeding under federal law to:

> (i) all rights, titles, powers, and privileges of the insured depository institution.
>
> (ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

12 U.S.C. § 1821 (d) (2) (A)

(6) The most serious problem in the instant case is what additional proof is needed to prove that enforceable title to the Note was transmitted to the FDIC in its subsequent and present capacity as receiver of the bridge bank, NMNB. Under the Maine negotiable instruments law, there has to be "(p)roof of a transfer to the transferee by a holder" of the Note, establishing "proof that the transferee (i.e., the FDIC as receiver of NMNB) has acquired the rights of a holder (MNB)." 11 M.R.S.A. § 3-1203. Comment 2, supra. As stated above, if the FDIC were suing in the capacity of receiver of MNB, nothing more would be required than a showing of such receivership, coupled with a production of the Note, for the FDIC to become entitled

to the presumption that it was entitled to payment.

The FDIC relied on the testimony of its witness, Golden, to show this. Golden testified, among other things, to the FDIC's receivership of MNB, the creation of NMNB, the subsequent dissolution of NMNB, the subsequent dissolution of NMNB, and the Note's transfer to the FDIC as NMNB's receiver. The court, however, struck Golden's testimony. We agree with the court that Golden, having taken over the Houde file only two weeks before trial and not claiming direct personal knowledge of these events, could not testify to them over objection. See Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.") Although, as custodian of the Houde file, his testimony might well have been sufficient to authenticate business records, admissible under an exception to the hearsay rule, that may have proved the underlying transactions, see Fed.R.Evid. 803(6), the FDIC did not have any of the underlying documents with it at trial.

(8) Attempting to justify the lack of admissible foundation evidence, the FDIC now argues that because the Note was never indorsed and never made payable to anyone other than MNB, it plainly could not have been sold to a third party by the FDIC or the bridge bank. But while the absence of an indorsement on the Note strengthens the argument that no one acquired a title superior to that of the FDIC, it does not by itself meet the FDIC's burden to "account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it." 11 M.R.S.A. § 3-1208, Comment 2, supra/

12 USC § 1821 (d) (2) (A)

12 U.S.C. § 1821

(d) Powers and duties of Corporation as conservator or receiver

(2) General powers

(A) Successor to institution

The Corporation shall, as conservator or receiver, and by operation of law, succeed to-

(i) all rights, titles, powrs, and privileges of the insured depository institution and of any stockholder, member, account-holder depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

Excerpt from Page 565 of Security Pacific Nat. Bank v Chess 58 Cal App 3d 555

The only court decision which plaintiff cites for its interpretation of section 3201 is Bowling Green Inc. v. State Street Bank and Trust Co (1st Cir. 1970) 425 F.2d 81. In that case Bowling Green negotiated a government check to Bowl-Mor, who deposited the check in State Street Bank. The bank immediately credited a portion of the check against an overdraft in Bowl-Mor's account, and shortly afterwards applied the balance in that account against debts which Bowl-Mor owed the bank. There was no evidence that Bowl-Mor had indorsed the check. The ground of the Court of Appeals decision as stated in its opinion, is as follows: "...We therefore hold that a bank which takes an item for collection from a customer who was himself a holder need not establish that it took the item by negotiation in order to satisfy § 4-209 [of the Uniform Com. Code, corresponding to California Uniform Com. Code, § 4209]." (Id., at p.84).

In the course of its discussion the court said: "... The issue, however, is not whether the Bank bears the burden of proof, but whether it must establish that it took the item in question by endorsement in order to meet its burden. We think not. The evidence in this case indicates that the Bank's transferor, Bowl-Mor, was a holder. Under Mass. Gen. Laws ann. c. 106, § 3-201(a), transfer of an instrument vests in the transferee all the rights of the transferor. As the Official Comment to § 3-201 indicates, one who is not a holder must first establish the transaction by which he acquired the instrument before enforcing it, but the Bank has met this burden here." (id., at p. 83-84).

To the extent that Bowling Green interprets and applies division 4 generally and section 4209 in particular, it is distinguishable from the case at bench. Bowling Green involved an item taken by the bank for collection and deposited to the customer's account. Our case does not.

If the Bowling Green court intended to say that a transfer by a holder without indorsement gives the transferee the status of a holder, that statement is irreconcilable with the language of section 3201 and with the case law cited above, interpreting section 3201 and its antecedent in the Negotiable Instruments Law.

Footnote 2 on Page 1296 of White v Moriarity 15 Cal App 4th 1290

Without citation of authority, Moriarity argues that there was no substantial evidence that White actually acquired the note from the FDIC. However, the note bears the endorsement of FDIC to GFS and from GFS to White. A person in possession of an instrument endorsed to him is the holder of the instrument. (Cal. U. Com. Code § 1201, subd. (20).) Signatures are presumed genuine in the absence of contrary evidence.

(Cal. U. Com. Code, former § 3307, subd. (1) (b).) Furthermore, an obligation possessed by a creditor is presumed unpaid. (Evid. Code, § 635; Cal. U. Com. Code, former § 3307, subd. (2).) In the absence of any contrary evidence, the endorsements on the promissory note constituted substantial evidence of White's status as holder of the note.

Excerpt from Page 903 of D'Orazi v Bank of Canton
(1967) 254 Cal App 2d 901

Joseph handled all of the details of the transaction, and under his contract with D'Orazi Investment Company he was entitled to the sum of $15,000 from the commission of $25,000. This commission was to be paid by the Wardas in the following way: $5,000 in cash and $20,000 by promissory note. Joseph F. D'Orazi, however, agreed with his brother to take a smaller share of the commission: $3,000 in cash and a one-half interest in the promissory note. The $5,000 was accordingly split between the two brothers with $3,000 going to Joseph and $2,000 to Victor. The Escrow and Title Service of Turlock, as escrow holder, was directed to show by proper documents the agreement which had been reached by the two D'Orazis and the Wardas. In compliance with that arrangement, the escrow company sent to Victor W. D'Orazi in San Francisco an unsigned promissory note and Victor W. D'Orazi signed and sent back to the escrow company a writing contained on the back of the note reading: "The undersigned hereby assigns an undivided one-half interest in the within note, without recourse, to Joseph F. D'Orazi.

Historical and Statutory Notes to Former Cal Comm Code § 3201 and current § 3203

1992 Legislation

Legislative intent of State 1992, c. 914 (S.B.838) see Historical and Statutory Notes under § 1201.

Former § 3203 was repealed by State 1992, c. 914 (S.B. 838), § 5

Derivation: Former § 3201 enacted by States. 1986, C 819, § 3201

1992 Legislation

Legislative intent of Stats, 1992 c 914 (SB 838), see Historical and Statutory notes under § 1201

Former § 3201 was repealed by Stats. 1992 c 914 (SB 838),

See Commercial Code §§ 3203 and 3204

California Commercial Code
§ 3203 and Official Comment 2 thereto

Cal Coml Code § 3203

(a) An instrument is transferred when it is delivered by a person other than it's issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee can not acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under the Article and has only the rights of a partial assignee.

Official Comment 2 thereto

Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder. Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 8-308 that the transferee by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.